COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0691

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN A. CONWAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed.*

MYSE, P.J. Steven A. Conway appeals an order denying his motion to withdraw his pleas of guilty to one count of battery in violation of § 940.19(1), STATS., one count of disorderly conduct in violation of § 947.01, STATS., and one count of going armed with a firearm while under the influence of an intoxicant in violation of § 941.20(1)(b), STATS. Conway contends that manifest justice requires he be permitted to withdraw his pleas to these charges

based upon his assertions that he was denied the effective assistance of counsel, that the blood test used to prove his intoxication was unlawfully taken, that while under arrest he was battered by the police, that the district attorney violated the terms of the plea agreement and that the plea colloquy was infirm. Because this court holds on the face of the motion there is no merit to any of Conway's assertions, this court concludes that the trial court correctly denied Conway's motion without the benefit of hearing. The order denying Conway's motion to withdraw his pleas is affirmed.

The trial court construed Conway's "Motion to Withdraw Plea" as a § 974.06, STATS., motion and treated it accordingly. We similarly review Conway's motion as a § 974.06 motion.

A defendant who seeks to withdraw a guilty plea following sentencing must show by clear and convincing evidence that withdrawal is necessary to correct "manifest injustice." *See* ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). Manifest injustice requires a showing of "serious questions affecting the fundamental integrity of the plea." *See* ***Libke v. State***, 60 Wis.2d 121, 128, 208 N.W.2d 331, 335 (1973) (footnote omitted). A trial court's decision denying the right to withdraw a plea is discretionary and will not be upset on review unless there has been an erroneous exercise of discretion. *See* ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 234 (1996).

Certain of Conway's allegations present questions of constitutional fact. His claims of ineffective assistance of counsel and claims that the plea was not knowingly, voluntarily and intelligently entered are ordinarily reviewed as mixed questions of law and fact. *See* ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992); *see* ***State v. Bangert***, 131 Wis.2d 246, 283,

389 N.W.2d 12, 30 (1986). However, in this case the trial court did not hold an evidentiary hearing since the court determined that the motion was insufficient to raise questions of fact and could be disposed of based upon the nature of the claims in the motion itself. A motion for a plea withdrawal that is facially insufficient to raise a legitimate issue which would entitle the defendant to relief may be disposed of by order without the benefit of an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310-13, 548 N.W.2d 50, 54 (1996). Consequently, on review, this court examines whether the trial court erroneously exercised its discretion in denying Conway's motion to withdraw his pleas as facially insufficient.

Conway alleges he received the ineffective assistance of counsel for a variety of reasons. He first contends that his mental capacity and competency should have been challenged in the trial court and that counsel's failure to do so represents inadequate performance which operated to his prejudice. Conway contends that he was suffering from a mental illness at the time of the alleged offenses and that he was incompetent to stand trial at the time his pleas were entered. These assertions, however, contain no supporting evidence except a medical diagnosis made some nine months following the entry of his pleas. Without specific factual allegations Conway has not made a prima facie showing that his counsel should have put his mental state in issue at the time the pleas were entered. In the absence of any evidence that he was incompetent or that he lacked capacity to commit the crimes, the trial court correctly determined that the allegations were insufficient to raise an issue of his attorney's performance.

Second, Conway contends that his counsel was ineffective because his counsel was in collusion with the district attorney. Conway specifically alleges that every time he expressed reluctance about entering a plea the complaint would

be amended with new charges added as punishment for his recalcitrance in accepting the plea agreement offered by the district attorney. Not only is there no factual support for this assertion, the record before the court clearly indicates that there was but a single amendment to the complaint made well before discussions concerning the alleged plea agreement would have occurred. Because the collusion claim reflects a legal conclusion which is based on factual assertions which are inconsistent with documents reflected in the record, the trial court correctly denied this portion of the motion without an evidentiary hearing.

Third, Conway asserts that his trial counsel was ineffective because the district attorney was permitted to violate the terms of the plea agreement negotiated on Conway's behalf with the district attorney. The record discloses however that the plea agreement identified in open court and confirmed by Conway was assiduously honored by the State and the trial court. His assertion that the plea agreement terms were violated is without any factual basis in the record. The trial court therefore properly denied this assertion without the benefit of hearing.

Conway next asserts that he was battered by the police without justification or provocation except his use of the term "pigs" in reference to the police officers and that such use of excessive force constitutes a manifest injustice entitling him to withdraw his pleas of guilty. This court finds such an assertion facially deficient. If the battery occurred, it is unrelated even by Conway's version of events to his decision to enter a plea or to the ultimate disposition of these charges. The assertion that he was battered by the police without more is not a basis upon which a trial court could make a finding of manifest injustice.

Conway further contends that the blood test was taken in violation of his constitutional rights and without his consent and should have been suppressed. Absent a motion to suppress, a plea of guilty, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses including alleged violations of constitutional rights prior to the plea and therefore fails to represent a basis upon which a court could find manifest injustice. *See* ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). Section 971.31(10), STATS., preserves to a defendant the right to appellate review of the denial of a motion to suppress evidence notwithstanding the fact that a judgment of conviction was entered upon a plea of guilty. *See* ***id.*** No such motion was made here.

If Conway's assertion is that counsel was ineffective for failing to challenge the blood test, Conway has failed to state a basis upon which such finding could be made. Conway provides no information as to what other evidence existed regarding his state of intoxication nor is there any showing that had the blood test evidence been successfully suppressed the State did not have sufficient additional evidence to support Conway's conviction. In the absence of such a showing Conway has not demonstrated any prejudice flowing from his allegation of deficient performance and his assertion is insufficient to demonstrate a manifest injustice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Finally, Conway asserts that the plea colloquy was deficient and that his plea was not demonstrated to be voluntarily, knowingly and intelligently made. The record of the plea colloquy however discloses that it conforms in all respects with the requirements of § 971.08, STATS., and of ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986). Accordingly, Conway's assertion represents a legal conclusion without any factual basis and is insufficient to demonstrate a manifest injustice.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.